

STATE OF MICHIGAN
COURT OF APPEALS

MARK S. MILNER,

Plaintiff-Appellee,

v

KIM P. MILNER,

Defendant-Appellant.

UNPUBLISHED

July 10, 2008

No. 280840

Oakland Circuit Court

Family Division

LC No. 1999-626914-DM

Before: Owens, P.J., O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying her 2007 motion to change physical custody of her two minor children with plaintiff. We affirm.

Defendant contends that the trial court improperly determined that she failed to establish proper cause or a change in circumstances sufficient to warrant reconsideration of the court's 2006 order awarding plaintiff physical custody of the children.

There are three different standards of review applicable to child custody cases. The trial court's factual findings on matters such as the established custodial environment and the best-interests factors are reviewed under the great weight of the evidence standard and will be affirmed "unless the evidence clearly preponderates in the opposite direction." In reviewing the findings, this Court defers to the trial court's determination of credibility. A trial court's discretionary rulings, such as the court's determination on the issue of custody, are reviewed for an abuse of discretion. Further, pursuant to MCL 722.28, questions of law in custody cases are reviewed for clear legal error. [*Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006) (internal citations omitted).]

The determination of whether there is proper cause or a change in circumstances sufficient to reconsider a custody award is a question of fact, which we review under the great weight of the evidence standard. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003).

The goal of MCL 722.27 is to "to minimize unwarranted and disruptive changes of custody orders," except under the most compelling circumstances. *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593; 532 NW2d 205 (1995); see also *Foskett v Foskett*, 247 Mich

App 1, 6; 634 NW2d 363 (2001). Pursuant to the statute, a trial court may modify a custody award only if the moving party establishes proper cause or a “change in circumstances.” MCL 722.27(1)(c); *Vodvarka, supra* at 508-509; *Phillips v Jordan*, 241 Mich App 17, 24; 614 NW2d 183 (2000). If the moving party overcomes the initial threshold, the court must determine if the child has an established custodial environment with one parent or both. “[W]hen a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child’s best interest.” *MacIntyre v MacIntyre*, 267 Mich App 449, 451; 705 NW2d 144 (2005); *Phillips, supra* at 25. Once the court makes a factual determination regarding the existence of an established custodial environment, the court must weigh the statutory best interest factors of MCL 722.23 and make a factual finding regarding each factor. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999).

At issue in this case is whether defendant met her burden of establishing proper cause or a change in circumstances requiring the court to reconsider its 2006 custody order. Defendant was required to establish proper cause or a change in circumstances by a “preponderance of the evidence.” *Vodvarka, supra* at 509. This Court summarized its definition of “proper cause” in *Vodvarka, supra* at 512, as follows:

[T]o establish “proper cause” necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child’s well-being. When a movant has demonstrated such proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors.

The court need not wait until the “appropriate ground” has already had a negative effect on the child’s life. However, the court may not speculate “about facts that may arise in the future . . .” *Vodvarka, supra* at 511 n 10.

This Court defined “a change in circumstances” in *Vodvarka, supra* at 513-514, as follows:

[I]n order to establish a “change of circumstances,” a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child’s well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child’s environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors.

To determine whether such a change has occurred, the court must compare conditions arising after the previous custody order was entered to conditions existing at the time of and before the entry of the previous order. *Vodvarka, supra* at 514.

We agree with the trial court that defendant failed to establish by a preponderance of the evidence either proper cause or a change in circumstances since September 2006 sufficient to warrant reconsideration of the previous custody award. As noted by plaintiff, several of the factors raised by defendant are “normal life changes” insufficient to warrant reconsideration of the 2006 custody order. Defendant alleged that she moved residences and jobs to be close to the children. However, those factors are completely irrelevant. The trial court expressed no concern with defendant’s prior home or job. Further, the fact that plaintiff relied on a babysitter to care for the children for one hour in the afternoon and during the work day during summer vacation is a normal situation that any child might face.

Defendant indicated that Sarah’s grades did not improve over the 2006/2007 school year despite the change in schools, a claim that plaintiff denied. Neither party presented Sarah’s report cards to prove their point. However, Dr. Frederick Marshall, the family counselor treating plaintiff and the children, indicated that both children ended the school year with stellar grades despite some mid-year setbacks. It was undisputed that Sarah received failing grades throughout the majority of the prior school year. Defendant also alleged that plaintiff threatened to file a lawsuit against Sarah’s school counselor and English teacher for raising concerns about the child’s well-being. However, defendant presented a letter from the counselor in which she merely expressed her concerns that Sarah was unhappy in plaintiff’s home and feared retribution for venting those concerns at school. The counselor did not indicate that plaintiff had a negative reaction when she raised her concerns regarding Sarah. From the evidence presented, it is clear that the children’s school performances only changed for the better after the 2006 custody order. Moreover, the evidence that Sarah and Michael were fearful in plaintiff’s home was rebutted by Dr. Marshall and might have been rebutted by Dr. Carol Stratman, the court appointed therapist who treated Sarah and interviewed both plaintiff and defendant throughout the year, had either party contacted her to provide a letter regarding these proceedings.

Defendant’s participation in individual therapy and in family therapy with the children was a positive step. However, defendant failed to present any evidence from Dr. Stratman, the only neutral professional familiar with both sides of the story. In any event, Sarah and Michael reported their unhappiness in plaintiff’s home and dislike for their stepmother prior to the entry of the 2006 custody order. For whatever reason, the court rejected the children’s complaints at that time and we may not reassess its evaluation of witness credibility. *Fletcher v Fletcher*, 447 Mich 871, 889-890; 526 NW2d 889 (1994). The children’s continuing complaints raised no new concerns after the order was entered and, therefore, could not form the basis of a change in circumstances. See *Vodvarka, supra* at 514.

The trial court may only conduct an evidentiary hearing to determine if a change in custody would be in the child’s best interests if the moving party establishes proper cause or a change in circumstances. *Killingbeck v Killingbeck*, 269 Mich App 132, 145; 711 NW2d 759 (2005); *Vodvarka, supra* at 508-509. Although the threshold consideration of whether there was proper cause or a change of circumstances might be fact-intensive, the court need not necessarily conduct an evidentiary hearing on the topic. *Vodvarka, supra* at 512. Defendant failed to meet

the threshold requirement and, therefore, the trial court was not required to conduct a hearing or consider the best interest factors. *Killingbeck, supra* at 148.

Defendant further contends that the trial court violated her right to due process when it failed to conduct an evidentiary hearing. Defendant relies on MCR 3.210(c)(8), which provides:

In deciding whether an evidentiary hearing is necessary with regard to a postjudgment motion to change custody, the court must determine, by requiring an offer of proof or otherwise, whether there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion.

Both parties presented evidence with their pleadings and, therefore, made an offer of proof. The court reviewed the pleadings and evidence and an FOC recommendation and heard oral arguments before rendering its decision. The record shows that the court carefully considered the issues before determining that defendant failed to meet the threshold requirement of establishing probable cause or a change in circumstances. Accordingly, the trial court properly denied defendant's motion for a change in custody and did not deny defendant her right to due process in doing so.

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis